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No. 88-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AETNA LIFE INSURANCE CO.,
Petitioner,

v.

FRANCISCO L. BORGES, TREASURER OF THE STATE OF CONNECTICUT, and STATE OF CONNECTICUT,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER

1. The State of Connecticut, like forty-seven other States, the District of Columbia, and the Virgin Islands, asserts the right to require ERISA plans to pay benefits to it when the ERISA beneficiary has left those benefits unclaimed for a specified period of time. Connecticut, like the other forty-nine jurisdictions, purports to relieve ERISA plans of their obligations for the unclaimed benefits and to require the beneficiaries to seek those benefits from a designated State official rather than from the plan and its insurer. And Connecticut, like each of the other States and territories, requires ERISA plans to maintain specified records, to comply with State-mandated notification procedures, and to file required reports on a periodic basis.

Nonetheless, Connecticut contends that the question presented by this petition is unique to Connecticut and Aetna. Yet even the State recognizes that Aetna's accounting system, which does not charge a loss to an ERISA plan's claim experience until after the draft issued to the claimant has been presented and

paid, strengthens Aetna's argument for pre-emption.[1] *See* Resp. Br. 3-4. It follows, therefore, that the conclusion below would apply *a fortiori* when the insurance used to fund plan benefits, *see* ERISA § 3-1(1), 29 U.S.C § 1002(1), treats a benefit as paid as soon as a draft has been issued.

Thus, the State's argument merely emphasizes the extent of the holding below. Nothing in that holding turns on or is restricted to Aetna's accounting system. The holding below subjects, at the least, all insured ERISA plans to the escheat laws of fifty jurisdictions. That holding, with its nationwide effect on nationwide plans, should be reviewed by this Court.

2. The State's sole defense for the construction of Section 502 of ERISA, 29 U.S.C. § 1132, adopted by the court below is a one sentence assertion that the Second Circuit is correct. Resp. Br. 8. The State does not challenge Aetna's showing that the Second Circuit's restriction of Section 502 to actions "governing the issuance of drafts in the first instance," App. A15, is flatly inconsistent with the statutory language. *See* Pet. 17-18. Similarly, Connecticut does not refute Aetna's demonstration that the escheat statute purports completely to displace the remedy provided by Section 502. *See* Pet. 15-16. In light of the importance of Section 502 to the congressional scheme, this Court should review the Second Circuit's restrictive construction of that provision.

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[1] Aetna's accounting system makes the effect of applying the escheat law to ERISA plan benefits more readily apparent, because the benefits Aetna must turn over to the State - and for which it will therefore charge the plans - would otherwise never have entered into the accounting between insurer and plan. Contrary to the State's argument, however, Aetna's accounting system is not the source of the economic detriment caused to plans by application of the escheat law. Obviously, paying a benefit that would otherwise remain unpaid raises costs. That fact is true under any system of accounting.

3. The State does not dispute Aetna's demonstration that complying with the escheat statutes of the various jurisdictions imposes considerable burdens of record keeping, reporting, and administrative action on multi-state ERISA plans. Like the court below, Connecticut simply asserts that the States are free to impose such burdens on ERISA plans because the States' requirements do "not affect the calculation of ERISA benefits, the processing of payment or disbursing benefits [sic] . . .." Resp. Br. 8.

This argument is wrong for two reasons. First, application of escheat statutes very much affects "the processing of payment[s] or disbursing [of] benefits." Indeed, after the period of time specified in the applicable escheat statute, the escheating State inserts itself into the ERISA process as the agent from that time forward for paying previously unclaimed ERISA benefits. Connecticut, like the court below, makes no effort to explain how such a drastic State intrusion into the relationship between ERISA plans and their beneficiaries can be justified.[2]

Moreover, nothing in Section 514(a) of ERISA or in the opinions of this Court supports the contention that ERISA's pre-emption of State laws "insofar as they may now or hereafter relate to" ERISA plans applies only to statutes that affect the initial calculation of benefits owed. Any such restriction undermines Congress' recognition of the inherently multi-state nature of many ERISA plans and its desire to stimulate the provision of benefits by freeing ERISA plans from the costly burdens of complying with the regulatory requirements of the various States.

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[2] The State does not address Aetna's demonstration that compliance with escheat statutes will impose significant burdens not only on ERISA plans but also on ERISA plan beneficiaries. *See* Pet. 21 & n. 29.

4. Apparently recognizing that it cannot defend the basis on which the court below disclaimed inconsistency between its opinion and the opinion of the 11th Circuit in *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance*, 791 F. 2d 1501 (11th Cir. 1986), the State argues instead that there is no conflict between the circuits because they were construing different statutes. Resp. Br. 5.[3] The State fails, however, to address the equally indisputable fact that "there is no meaningful difference" between the statutory language construed by the 11th Circuit and Section 514(a) of ERISA. *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking & Finance, supra*, 791 F.2d at 1504; Pet. 7 & n. 11.

The Eleventh Circuit has held that statutory language essentially identical to Section 514(a) of ERISA precludes the State of Florida from claiming under its unclaimed property act health benefits not collected by federal employees under the federal welfare benefit plan. The Second Circuit has held that Section 514(a) of ERISA does not protect private employers and plans from the assertion of identical State authority. This Court should resolve the conflict between the circuits.

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[3] Aetna clearly states that indisputable fact in its petition. Pet. 7. The State's attempted distinction of the 11th Circuit's opinion on the ground that the court in that case was merely deferring to an administrative construction fails because the agency charged with administering ERISA, the United States Department of Labor, has repeatedly concluded that State escheat laws "relate to" ERISA plans insofar as they apply to unclaimed ERISA plan benefits. See Pet. 21 & n. 24.

CONCLUSION

For the reasons stated above and in Aetna's Petition for Writ of Certiorari, this Court should grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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